No. 84-963 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1984

JAMES C. LANE AND DENNIS R. LANE,
CROSS-PETITIONERS

v.

UNITED STATES OF AMERICA

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Cross-petitioners contend that there was insufficient evidence to support their convictions for mail fraud.

1. After a jury trial in the United States District Court for the Northern District of Texas, cross-petitioner James C. (J.C.) Lane was convicted on four counts of mail fraud, in violation of 18 U.S.C. 1341, and one count of conspiracy, in violation of 18 U.S.C. 371. He was sentenced to a total of seven years' imprisonment and fined $9,000. His son, cross-petitioner Dennis Lane, was convicted on three counts of mail fraud, one count of conspiracy, and one count of perjury, in violation of 18 U.S.C. 1623. He was sentenced to custody under the Federal Youth Corrections Act, 18 U.S.C. 4216, 5010(b).

The court of appeals reversed on all counts (Pet. App. 1a-20a), ruling that count 1 of the indictment was improperly joined under Fed. R. Crim. P. 8(b) with the other five

counts (Pet. App. 9a-13a). The court also ruled (*id.* at 13a-18a) that the evidence was sufficient to support the convictions, concluding that the charged "mailings were for the purpose of executing the fraudulent scheme" (*id.* at 18a).

The United States has filed a certiorari petition, now pending before the Court, presenting the question whether the court of appeals erred in reversing the convictions on the basis of misjoinder without determining whether the error was harmless. *United States* v. *Lane*, No. 84-744. J.C. and Dennis Lane, respondents in No. 84-744, seek review in this cross-petition of the court of appeals' determination that there was sufficient evidence of mailings in furtherance of a fraudulent scheme to support their convictions on counts 2 through 4. That factbound contention, which is wholly independent of the issue raised by our petition, does not merit this Court's review.

2. The facts are set forth in our petition in No. 84-744 (at 2-5) and in the opinion of the court of appeals (Pet. App. 2a-7a). Briefly, counts 2 through 4 charged cross-petitioners with mail fraud in connection with a 1980 fire in a duplex in Amarillo, Texas. After arranging for the duplex to be burned, the Lanes obtained over $24,000 from their insurer for losses and purported repairs made to the building. Dennis Lane submitted fraudulent proof-of-loss forms and materials invoices to an insurance adjustor, who issued drafts to Lane in payment on the policy. Shortly after issuing each draft, the adjustor mailed the form or invoices submitted by Lane to the insurance company's headquarters. These mailings formed the basis for the relevant counts of the indictment. Pet. App. 3a-5a, 15a-16a & n.10.

The court of appeals rejected the Lanes' argument that the mailings could not have been in furtherance of their fraudulent scheme because they took place in each case

after the relevant payment had been made (Pet. App. 15a-18a). The court noted that the jury had been instructed that "mailings 'which facilitate concealment of the scheme are mailings in furtherance of the scheme' " (*id.* at 17a n.11). There was ample evidence that the charged mailings did help to conceal the Lanes' fraud (*id.* at 18a):

> The Proofs of Loss declared that the "loss did not originate by any act, design or procurement on the part of [the] insured" and that no attempt had been made to decieve [sic] the insurance company. [The company] required the insured to submit the forms; any failure to comply might have alerted [it] to the possibility of a fraud.

The jury could infer, the court concluded, "that the mailings were intended to and did have a lulling effect" on the company (*id.* at 17a) — a deviation from the standard practice of submitting the proof-of-loss forms and invoices might have prevented further payments or given rise to an investigation or an attempt to recoup the payments. The court of appeals therefore distinguished *United States* v. *Maze*, 414 U.S. 395 (1974), where this Court held that mailings were not in furtherance of a fraudulent scheme where they could not have enhanced, and probably reduced, the probability that the scheme would be successful.

3. Cross-petitioners renew their contention that the evidence was insufficient to support their convictions on counts 2 through 4, arguing that the decision below conflicts with *United States* v. *Ledesma*, 632 F.2d 670 (7th Cir. 1980), and *United States* v. *Maze, supra*. There is no conflict. Cross-petitioners' factbound claim does not warrant further review.

In *United States* v. *Maze*, this Court reversed a mail-fraud conviction based on the mailings from merchants to a bank of sales slips for purchases made with a stolen credit

card (414 U.S. at 396-397). The Court reasoned that these mailings "increased the probability that [the defendant] would be detected and apprehended" (*id.* at 403). The Court expressly distinguished the situation where mailings are "designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place" (*ibid.*). See *United States* v. *Sampson*, 371 U.S. 75 (1962) (mailings made after money was obtained were in furtherance of fraudulent scheme).

The decision below plainly is consistent with *Maze*. Far from increasing the likelihood that the Lanes would be apprehended, the mailings of their proof-of-loss forms and invoices to the insurance company helped to conceal their fraudulent scheme. Moreover, as *Sampson* makes clear, there is no per se rule that mailings taking place after money is obtained cannot violate the mail fraud statute.[1] Nor is there a conflict with *United States* v. *Ledesma*, *supra*. There, the court reversed one of the defendant's mail fraud convictions because the scheme had already "reached its fruition" by the time the charged mailing took place (632 F.2d at 678). The court noted, however, that mailings that facilitate concealment of a fraudulent scheme do violate the statute (*id.* at 677 n.11). The jury here was instructed in accordance with this rule, and the court of appeals correctly reasoned that the charged mailings did help to conceal the fraud.

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[1]See also, *e.g.*, *United States* v. *Ashdown*, 509 F.2d 793, 800 (5th Cir.), cert. denied, 423 U.S. 829 (1975); *United States* v. *Miles*, 483 F.2d 1372 (8th Cir. 1973); *United States* v. *Strauss*, 452 F.2d 375, 380 (7th Cir. 1971), cert. denied, 405 U.S. 989 (1972).

In any event, this is not a case in which the proceeds of the fraud were fully secured by the defendants prior to the mailings; the payment drafts issued to the Lanes were subject to approval by the insurance company's headquarters, and payment could have been stopped had the forms and invoices mailed to the company not been in order (Tr. 208-218). See *United States* v. *MacClain*, 501 F.2d 1006, 1012 (10th Cir. 1974).[2] This fact clearly distinguishes *Ledesma*, where the court did not point to any evidence that payment might have been halted at the time the mailing took place (see 632 F.2d at 677-678).

It is therefore respectfully submitted that the cross-petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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[2]Even after the funds had been drawn on by the Lanes, a stop-payment order would have resulted in the amounts being charged against their own bank account as overdrafts, rather than against the company's account (Tr. 377-397). Moreover, the mailings charged in counts 2 and 3 occurred before the final draft was issued; the scheme indisputably had not come to an end when those mailings took place.